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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOSHUA POKEMPNER, JONATHAN WRIGHT
and
KELLIE HERBERT

Appeal 2009-0611
Application 10/733,828
Technology Center 3700

Decided: ¹ April 15, 2009

Before JAMES T. MOORE, *Vice Chief Administrative Patent Judge*, and
JAMESON LEE and SALLY C. MEDLEY, *Administrative Patent Judges*.

MOORE, *Vice Chief Administrative Patent Judge*.

DECISION ON APPEAL

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STATEMENT OF THE CASE

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The Appellants appeal under 35 U.S.C. § 134 (2002) from a final
rejection of claims 1-4 and 6-72.² We have jurisdiction under 35 U.S.C.
§ 6(b) (2002).

¹ The two-month time period for filing an appeal or commencing a civil
action, as recited in 37 CFR § 1.304, begins to run from the decided date
shown on this page of the decision. The time period does not run from
Mail Date (paper delivery) or Notification Date (electronic delivery).

1 The Appellants' claims are directed to activity kits, such as would
2 include paper, pen, and other materials for keeping children amused while
3 traveling in cars.

4 For the anticipation rejection, the Appellants argue the rejected claims
5 57-60, 62-64 and 67-71 together as a group.

6 We select independent claim 57 to decide the appeal regarding the
7 rejections under 35 U.S.C. § 102(b).

8 For the obviousness rejections, the Appellants argue the following
9 groups of claims:

10 Claims 1-4, 6-8, 11-22, 25-29 and 61;

11 Claims 9, 10, 23 and 24;

12 Claims 30-33, 35-37, 49-56, 65 and 66;

13 Claims 34-48.

14 We select claims 1, 9, 30 and 34 as the representative claims from
15 their respective groups to decide the appeal regarding the rejections under 35
16 U.S.C. § 103(a). See 37 C.F.R. § 41.37(c)(1)(vii)(2006). Accordingly, the
17 remaining claims stand or fall with their representative claims.

18 Claim 1 reads as follows:

19 1. An activity kit, comprising:
20 a box for holding a set of writing implements or other materials
21 including rubber stamps, ink pads, playing cards or flash cards,
22 stickers or temporary tattoos;
23 the box having front, back and side panels defining two front
24 edges and two back edges; and
25 a pad of paper or book having a separate back panel hinged to
26 the box in a manner allowing the pad or book and box to fold
27 against one another in overlying registration.

² Claim 5 has been canceled. (App. Br. 1).

1
2 THE EVIDENCE

3
4 The Examiner relies upon the following as evidence in support of the
5 rejections:

6	Bauman	5,667,064	Sep. 16, 1997
7	Palmiter	5,671,951	Sep. 30, 1997
8	Wilson	6,164,976	Dec. 26, 2000
9	Kroop	5,388,689	Feb. 14, 2005

10
11
12 THE REJECTIONS

13 The following rejections are before us for review:

- 14 1. Claims 57-60, 62-64 and 67-71 stand rejected as being anticipated
15 under 35 U.S.C. § 102(b) over Kroop.
- 16 2. Claims 1-4, 6-8, 11-22, 25-29 and 61 stand rejected under 35 U.S.C. §
17 103(a) over the combination of Kroop and Wilson.
- 18 3. Claims 9, 10, 23 and 24 stand rejected under 35 U.S.C. § 103(a) over
19 the combination of Kroop, Wilson and Palmiter.
- 20 4. Claims 30-33, 35-47, 49-56, 65 and 66 stand rejected under 35 U.S.C.
21 § 103(a) over the combination of Kroop and Palmiter.
- 22 5. Claims 34 and 48 stand rejected under 35 U.S.C. § 103(a) over the
23 combination of Kroop, Palmiter and Wilson.

24 We AFFIRM.

25 ISSUES

26 Have the Appellants established that the Examiner erred in
27 determining that the prior art anticipated the front panel limitation of
28 rejected claims 57-60, 62-64 and 67-71?

1 Have the Appellants established that the Examiner erred in
2 determining that it would have been obvious to one of ordinary skill in the
3 art at the time the invention was made to combine known elements of the
4 prior art for their known functions?

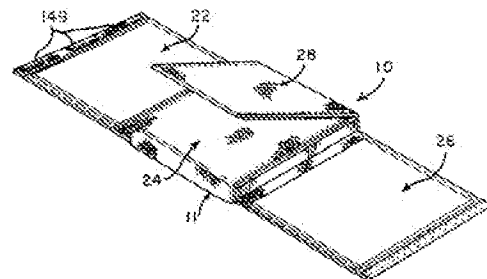
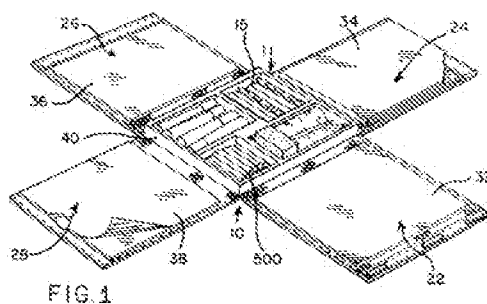
5 FINDINGS OF FACT

6 The record supports the following findings of fact by a preponderance
7 of the evidence.

8 1. Kroop describes “writing kits that provide a writing surface, offer
9 closeable storage for writing utensils, and are portable.” (Kroop 1:7-9).

10 2. Kroop describes that “[t]he writing kits of the present invention
11 comprise a base, a plurality of wings hingeably mounted to the base, and an
12 external wall extending from the base to form a compartment for storage of
13 writing implements.” (Id. 1:10-14).

14 3. Kroop figures 1 and 6 are reproduced below:



16
17 {Figure 1 shows a writing kit of the invention in the open position and
18 Figure 6 shows the process for closing the writing kit. (Id. 4:35-36)}
19

20 4. Kroop describes that the writing kit comprises a base 11 and a
21 plurality of wings 22, 24, 26 and 28 hingeably mounted to the base. (Id. 52-
22 55).

1 5. Kroop describes that hinges are formed by the engagement of
2 flexible portion edges on wings 22, 24, 26 with the base edges. (Id. 29-31).

3 6. Kroop also describes that one or more writing surfaces 32, 34, 36,
4 and 38, such as a pad of paper, are affixed to wings 22, 24, 26 and 28. (Id.
5 4:63-64; 5:56).

6 7. Kroop describes that the writing kit has an external wall 40 that
7 extends from the base 11 in a direction generally perpendicular to interior
8 base surface 15. (Id. 4:61-63).

9 8. Additionally, Kroop describes that the interior base surface 15
10 may contain ridges 60 adapted to receive writing utensils 500 or other
11 writing supplies. (Id. 5:7-10).

12 9. Kroop describes that a skilled artisan will “appreciate that the kit
13 of the present invention is portable, moveable, and provides for self-
14 contained storage. . . .” (Id. 8:56-58).

15 10. Wilson describes a creativity center comprising a base portion
16 connected by a hinge to a board with drawing/design work surfaces and may
17 include a compartment for storing art supplies. (Wilson Abstract).

18 11. Wilson describes that work surfaces may incorporate material
19 suitable for various uses, including for adhesion by stickers. (Id. 6:52-65).

20 12. Palmiter describes a carrying case having a detachable clip-board
21 employing a pad of papers. (Palmiter 1:1-6).

22 13. Palmiter describes that the case may include a carrying handle
23 sewn into the intersection of the edge and external surface of the case and
24 may also include a mirror-image carrying handle likewise attached. (Id.
25 5:45-47).

PRINCIPLES OF LAW

“[C]laims in an application are to be given their broadest reasonable interpretation consistent with the specification and [the] claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983) (citation omitted).

“If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1740 (2007).

ANALYSIS

I. The Anticipation Rejection of Claims 57-60, 62-64 and 67-71 over Kroop.

Claims 57-60, 62-64 and 67-71 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Kroop.

The Examiner found that Kroop describes “an activity kit comprising a box for holding a set of writing implements (500) or other materials and a pad of paper having a separate back panel (98) hinged to the box in a manner allowing the pad and box to fold against one another in overlying registration. . . .” (Final Rejection, Mar. 7, 2006, p. 2).

The Appellants assert that the Examiner erred in rejecting the claims because the structure in Kroop “that what the Examiner is calling a ‘box’ actually only has back and side panels, and does *not* include a front panel.” (App. Br. 3) (emphasis in original). According to the Appellants, “a point of novelty of the Kroop invention is that the pads of paper be folded onto the

1 box, thereby forming a multilayer ‘front panel’ that otherwise did not exist.”
2 (Id. p. 4).

3 It is well settled that “claims in an application are to be given their
4 broadest reasonable interpretation consistent with the specification and [the]
5 claim language should be read in light of the specification as it would be
6 interpreted by one of ordinary skill in the art.” *In re Sneed*, 710 at 1548.
7 We first need examine the language of the instant claim. We find that the
8 specification does not specifically define the claim term “front” panel, which
9 term, broadly construed, is relative to the orientation of the box. Therefore,
10 we construe the term “front” panel broadly to describe any front-facing
11 panel or wall. It is the applicants’ burden to precisely define the invention,
12 not the PTO’s. *In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997).

13 The Appellants have not directed us to any persuasive evidence that
14 the term “front panel” should be narrowly interpreted as a static top panel or
15 in any other manner so as to exclude its application to one of the external
16 walls 40 of the Kroop box.

17 Consequently, we find that the Appellants have not established that
18 the Examiner erred in determining that Kroop describes a “front” panel, as
19 claimed.

20 II. The Obviousness Rejection of Claims 1-4, 6-8, 11-22, 25-29
21 and 61 over the combination of Kroop and Wilson.

22 Claims 1-4, 6-8, 11-22, 25-29 and 61 stand rejected under 35 U.S.C. §
23 103(a) over the combination of Kroop and Wilson. The Examiner found that
24 Wilson describes “an activity kit using stickers.” (Final Rejection, p. 4)
25 (citing Wilson 6:65). According to the Examiner, it would have been

1 obvious for a person having ordinary skill in the art at the time of the
2 invention to provide the activity kit of Kroop with stickers because the
3 “modification would add greater versatility to the activity kit.” (Id.).

4 The Appellants assert that the Examiner erred in rejecting the claims
5 for the same reason asserted regarding the anticipation rejections, i.e., that
6 Kroop allegedly does not describe a box having a “front” panel. (App. Br.
7 4). Consequently, we find that the Appellants have not established error on
8 the part of the Examiner for the same reasons discussed, supra, regarding the
9 anticipation rejection.

10 III. The Obviousness Rejections of Claims 9, 10, 23 and 24 over
11 the combination of Kroop, Wilson and Palmiter and Claims 30-33, 35-47,
12 49-56, 65 and 66 over the combination of Kroop and Palmiter.

13 Claims 9, 10, 23 and 24 stand rejected under 35 U.S.C. § 103(a) over
14 the combination of Kroop, Wilson and Palmiter. Additionally, claims 30-33,
15 35-47, 49-56, 65 and 66 stand rejected under 35 U.S.C. § 103(a) over the
16 combination of Kroop and Palmiter. In addition to the findings discussed,
17 supra, the Examiner further found that Palmiter describes a portable case
18 having a pair of handles. (Final Rejection, p. 5). The Examiner determined
19 that it would have been obvious to a skilled artisan at the time of the
20 invention to provide the prior art activity kit with handles as taught by
21 Palmiter to allow the kit “to be carried or transported easily.” (Id.).

22 The Appellants challenge the Examiner’s rejection, asserting that
23 “there is no teaching or suggestion from the prior art to provide handles with
24 through-holes as taught by Palmiter et al. to the Kroop et al. article. . . .”
25 (App. Br. 5). The Appellants further assert that “it is impossible to ascertain

1 where such handles would go.” (Id.). According to the Appellants, “if a
2 through-hole were formed, it might extend through the kit itself, thereby
3 rendering the article unfit for its intended purpose.” (Id.).

4 This argument is unpersuasive. We find that all of the claimed
5 elements are known and used for their intended function. “If a person of
6 ordinary skill can implement a predictable variation, § 103 likely bars its
7 patentability.” *KSR* 127 S. Ct. at 1740.

8 It is not in dispute that handles are well known in the art as a means of
9 carrying readily moveable items. (See Answer p. 9). Additionally, as the
10 Examiner stated, Kroop describes “that the kit is portable as well as
11 moveable.” (Id.) (citing Kroop 8:57-59). Moreover, Palmiter expressly
12 describes including such a carrying means to a portable receptacle.

13 Therefore, evidence of a reason to combine Palmiter’s handles with Kroop’s
14 activity kit is found in references and from the knowledge of one of ordinary
15 skill in the art (See, e.g., *Dystar Textilfarben GmbH & Co. Deutschland KG*
16 *v. C.H. Patrick Co.*, 464 F.3d 1356, 1366 (Fed. Cir. 2006)).

17 Further, insofar as the Appellants assert that it would be “impossible”
18 for a skilled artisan to determine where to place carrying handles on the
19 activity kit of Kroop without rendering the kit “unfit for its intended
20 purpose,” we are not provided with evidence from the skilled artisan to
21 support this argument. We therefore are unpersuaded of this allegation of
22 error.

1 IV. The Obviousness Rejection of Claims 34 and 48 over the
2 combination of Kroop, Palmiter and Wilson.

3 Claims 34 and 48 stand rejected under 35 U.S.C. § 103(a) over the
4 combination of Kroop, Palmiter and Wilson. (Final Rejection, pp. 6-7).
5 These claims depend from claims 30 and 44, respectively, which recite “a
6 box for holding a set of writing implements or other materials. . . .” (App.
7 Br. 11, 13, Claims Appendix). Claims 34 and 48 recite that the “other
8 materials” include “rubber stamps, ink pads, playing cards or flash cards,
9 stickers or temporary tattoos.” (Id.).

10 The Appellants assert that the Examiner erred in rejecting the claims
11 because “there is no teaching or suggestion from the prior art to add these
12 [other] materials to any of the kits described in the cited prior art,” as
13 claimed. (App. Br. 6).

14 This argument is not persuasive. First, to the extent that the
15 Appellants may be taking a position that it would not have been obvious to
16 place the recited items in boxes, we note that such a position is completely
17 without merit. Moreover, the claimed box is not specifically limited by the
18 phrase “for holding a set of writing implements or other materials” which is
19 a statement of intended use for the box.

20 Consequently, the Appellants have not established that the Examiner
21 erred in rejecting the claims. We affirm the Examiner’s rejections.

1 CONCLUSION

2 On the record before us, the Appellants have not shown error on the
3 part of the Examiner. The prior art anticipates the front panel limitation of
4 rejected claims 57-60, 62-64 and 67-71.

5 Additionally, it would have been obvious to one of ordinary skill in
6 the art at the time the invention was made to combine the known elements of
7 the prior art for their known functions.

8 DECISION

9 The Rejection of claims 57-60, 62-64 and 67-71 as being anticipated
10 under 35 U.S.C. § 102(b) over Kroop is AFFIRMED.

11 The Rejection of claims 1-4, 6-8, 11-22, 25-29 and 61 under 35
12 U.S.C. § 103(a) as being unpatentable over the combination of Kroop and
13 Wilson Reference is AFFIRMED.

14 The Rejection of claims 9, 10, 23 and 24 under 35 U.S.C. § 103(a) as
15 being unpatentable over the combination of Kroop, Wilson and Palmiter
16 Reference is AFFIRMED.

17 The Rejection of claims 30-33, 35-47, 49-56, 65 and 66 under 35
18 U.S.C. § 103(a) as being unpatentable over the combination of Kroop and
19 Palmiter is AFFIRMED.

20 The Rejection of claims 34 and 48 under 35 U.S.C. § 103(a) as being
21 unpatentable over the combination of Kroop, Palmiter and Wilson is
22 AFFIRMED.

